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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 998

TREY PACKING, INC., GOL-PACK CORPORATION, NATIONAL FROSTED FOOD CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Honorable Justices of the United States Supreme Court:

The petition of Trey Packing, Inc., Gol-Pack Corporation and National Frosted Food Co., Inc., the petitioners, who are hereinafter referred to collectively as the "employer," pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on January 7, 1969 (Appendix B), which affirmed the order of the National Labor Relations Board holding the employer guilty of alleged unfair labor practices under the provision of 29 U.S.C. 158.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 7, 1969, and there have been no orders entered respecting a rehearing or the granting of an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254.

Questions Presented

Did not the Second Circuit fail to decide a necessarily decisive issue in the matter: namely, was not the employer entrapped into the commission of the alleged unfair labor practices, assuming that the employer committed them? Should not this Court determine whether the defense of entrapment is available for defendants before administrative tribunals in cases such as this, in which the Government enforces heavy fines and penalties of a *quasi* criminal character?

Should not this Court determine the disparity in labor law, as enforced in the Fourth Circuit and in the Second Circuit, since the Fourth Circuit does not permit a bargaining order as an automatic punishment for alleged unfair labor practices and since the Second Circuit, in this case, has enforced a bargaining order as an automatic response to the alleged commission of such practices?

Should not the relief of certiorari be granted to a party who has been denied its right to brief its side of the case and the right to have an oral argument following the brief, particularly in the light of the fact that the opposition to such party, namely the Government of the United States, has had full opportunity to do those things?

Statutes and Rules Involved

The employer is alleged to have violated the provisions of 29 U.S.C. 158. The employer was also held not entitled to the rights granted, as a matter of law, under the rules of practice and procedure of the United States Court of Appeals for the Second Circuit. Lastly, the common law rule of entrapment was neither applied nor held applicable or inapplicable in a case wherein such entrapment is an important factor.

Statement of the Case

On June 14, 1967, the employer received a letter from the Teamsters Union seeking to represent four out of its five drivers. Within the following 48 hours, one of the drivers, named Trexler, approached Lawrence Goldwasser, the highest ranking officer of the employer at the facility involved and the 26-year-old son of the company president. He asked Goldwasser "how he felt about the union."

A few days later Trexler admits "I asked him about getting the fellows together . . . and tell us all in a group what he had told me about . . . because he told me before he didn't want the union in." Goldwasser said he could not do that but that Trexler was free to do so. A few days later Trexler came back and told Goldwasser he tried in vain to talk the men out of the union. Meanwhile, another driver voluntarily came into Goldwasser's office and "brought up the fact" that he was "uncertain about the union."

Ascertaining that a third driver had never been approached by the union, Goldwasser concluded that the union had no majority. The employer therefore went forward with a pre-arranged plan to lay off the two junior unneeded drivers.

Following this, the union sought a Board-conducted election, which the employer expressed its willingness to have as long as the unit was five drivers and not as the union wanted—four drivers. When an unfair labor practice charge was filed as a result of the terminations, the employer offered to take the two men back as a prerequisite to an election. The union was never informed of this offer by the Board, but the Board turned it down. Two more invitations to return were extended to the terminated men as other jobs became available at an increased rate, but these men, at the behest of the union and the Board, turned down the offers.

During the period when the employer was attempting to determine whether the union's claim was valid, Trexler's wife accosted a company official and said, "What do you think about the union, because at this time I wasn't for it either."

Based on these facts, the Board conducted a hearing at which all of the basic rights and the presentation of evidence on behalf of the employer were violated. Without referring in any way to the employer's brief, the Board held it guilty on all counts, ordered it to bargain with the union, ordered it to pay back pay for the whole period to the terminated employees, and ordered it to desist from what were alleged to be its acts of coercion against its employees.

The Second Circuit did not grant the employer the rights allowed it under its own rules to brief and argue the matter. It avoided entirely the true issue of entrapment in the case and attempted to gloss over its opposition to the law as to bargaining by claiming a non-existent factual distinction between this case and the leading cases on the question in other circuits.

Reasons for Granting the Writ

A.

This Court should rule on the issue of entrapment, ignored below, which is an important defense in this *quasi* criminal proceeding.

Every allegedly illegal statement made by the employer's agents in this case was the result of a question or leading remark by a union advocate, one Trexler, and his wife. This broad statement was completely documented in the briefs and appendices below.

The Court of Appeals classifies these solid facts as "ephemeral." It then admits that it has no opinion as to whether entrapment is a valid defense to an unfair labor practice charge. Lastly, it claims that Trexler can "by no stretch of the imagination" be considered a government agent during his entrapment of the employer's 26 year old supervisor.

As to these three answers we urge on this Court the following three points:

1. Calling entrapment "ephemeral" tells us nothing. Any oral statement or question is ephemeral, ceasing when the sound waves have spent themselves. Even shooting somebody is ephemeral. But the legal results are not ephemeral.

2. The Court below refused to reach a conclusion on entrapment under labor law. But such a conclusion is legally required, and this Court should enunciate it. Already the groundwork has been laid for this overdue development of defense in administrative procedures. *Knoll Associated Investments* v. *F.C.C.*, 397 F. 2d 530, 7 Cir., 1968. Too long have administrative agencies, applying *quasi* criminal sanctions, been permitted immunity from established legal safeguards.

3. Despite the unwillingness of the Court below to "stretch" its "imagination" in this case, Trexler and his wife entrapped the employer. Their entrapment is the basis of the Board's claim and hence they are the governmental agents whose acts vitiate the Board's case. *Sherman* v. *U. S.*, 356 U. S. 369 (1958) at 373; *U. S.* v. *Romano*, 278 F. 2d 202 (2 Cir., 1960), at p. 204. Even if Trexler were not to be considered in any way the Board's tool, the use of what he did by the Government is proscribed. *Sorrells* v. *U. S.*, 287 U. S. 435 (1932) at p. 445.

B.

On the issue of imposing a bargaining order as a remedy for an unfair labor practice, the Fourth Circuit and the Second Circuit are in direct disagreement.

In *NLRB* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967), the Fourth Circuit held that an employer who had a good faith doubt concerning a union's majority could not be punished for unfair labor practices by an order to bargain with the union. *C. F. Crawford Mfg. Co.* v. *NLRB*, 386 F. 2d 367 (4th Cir., 1967) cer. den. 390 U. S. 1028 (1968).

In this case there was a good faith doubt about the majority of the union. Within a week of the union's demand, three of the five drivers had voluntarily told the employer they were doubtful of their union allegance. They did this before any allegedly illegal action was taken against them. The Court below is simply wrong in holding the contrary.

Moreover, as the Court below entirely forgets, there was a good faith dispute as to the size of the unit—four drivers or five—and this alone would require an election. *Mount*

Hope Finishing Co. v. *NLRB*, 211 F. 2d 365 (4th Cir., 1954).

In the face of this law, the Second Circuit has in this case issued an order to enforce bargaining as an automatic punishment for an unfair labor practice despite the good faith doubt. It has tried to disguise this disagreement with prior law by unfounded epithets concerning the employer's behavior which are nowhere justified by the record. As a matter of fact, the employer's activities in *Logan* were far more reprehensible than those at bar.

C.

The Court of Appeals violated the legal rights of the appellant-employer by scheduling the hearing in this case contrary to the rules of court.

28 U.S.C.A. 2071 states that the Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules must be consistent with acts of Congress and with rules of practice prescribed by the Supreme Court.

The rules of a Court of Appeals have the force and effect of law. *Bradley* v. *Pace*, 183 F. 2d 806 (App. D. C. 1950).

Rule 15 of the Rules of the Second Circuit provides that the appellant's brief be filed not later than 20 days following the filing of the record in the Court of Appeals. The appellee then has 20 days in which to file his brief, after which the appellant has 15 days to file his reply brief.

In this case the Court called this matter for argument on the 30th day after the filing of the employer's brief. The Board, with our consent, asked for an extension, which was turned down with dispatch. It seemed obvious to the

undersigned that a new request for extension would also be denied.

The brief of the Board was served on the employer on the day before the argument. At the hearing, employer's counsel attempted to read the following statement:

> "It is with considerable reluctance that, as an advocate, I must open my case with criticism of this Court's procedure.
>
> "Today is the 30th day following my filing of the appellant's brief. Yesterday, while I was in court in another case, my office was served with an answering brief from the NLRB. I have had no reasonable time to study that brief and check the authorities on which it allegedly relies. Hence the Board appears here today having fully studied my case, whereas I have not had any opportunity to study its case. Under the rules I have the right to file a reply brief 15 days from yesterday and the right to file in 20 days an answering brief, on the Board's petition. I am being deprived of my right to argue orally the contents of such briefs, both my response to the brief of the Board and my answering brief to the Board's petition.*
>
> "A motion to adjourn the hearing today was made by the NLRB with my consent. It was summarily denied. Having no reason to believe a similar motion by me would be more successful, I have made none.
>
> "As an attorney, I am duty bound respectfully to inform this Honorable Court that my clients have been denied their rights under the rules governing appeals. I reserve all rights which my client may have under these circumstances and I present only so much of my clients' argument as I can at this time."

When counsel had reached the point designated above by the asterisk, the presiding Judge broke in to denounce the statement. He said the reading of it should stop, there being no record. He added that oral argument was a privilege, not a right, and that counsel had no standing to question the mode of court business.

At the end of the employer's substantive argument, the presiding Judge asked how many days we needed for a reply brief. Ten days were asked, even though under the rules 14 more were already granted. Ten days were refused, and service of the reply brief was required after only three working days—Tuesday in New York to the following Monday in Washington.

Such serious breach of appellants' rights under the rules vitiates the entire hearing of the matter in the Second Circuit and requires action by this Court.

That such breach actually did the appellants harm in this case is shown by the very opinion of the Second Circuit. This opinion misconstrues a number of facts and ignores undisputed points of evidence which are of great importance. For example, the Court of Appeals states that the change of mind of three drivers as to the union came after certain remarks of the employer. The evidence shows this not to be so. The right of the employer to an election and a determination of the appropriate bargaining unit is completely ignored in the opinion below.

CONCLUSION

It is respectfully submitted that the questions raised are of such importance in the administration of law that an authoritative determination of the same should be made by this Court. Accordingly, petitioners ask that this Court issue a writ to review the judgment below.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 193-96—September Term, 1968.

(Argued November 20, 1968 Decided December 11, 1968.)

Docket Nos. 32,559-61, 32,713

TREY PACKING, INC., GOL-PACK CORPORATION, NATIONAL FROSTED FOOD CO., INC.,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

KAUFMAN, ANDERSON, *Circuit Judges,* and TENNEY, *District Judge.**

Petition for review of a decision of the National Labor Relations Board finding that the employer had committed

* Of the Southern District of New York, sitting by designation.

unfair labor practices in violation of §§8(a)(1), (3) and (5) of the National Labor Relations Act and ordering it to cease and desist from further violations, to reinstate in their former positions and reimburse for losses suffered the two employees it had discriminatorily discharged, to bargain with the Union, and to post the usual notices. Cross-petition by the Board for enforcement of its order. The petition for review is denied, and the cross-petition for enforcement is granted.

JOHN J. BRACKEN, Bracken & Walsh, Newark, N. J., for petitioners.

GLEN M. BENDIXSEN (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, William J. Avrutis, Edward E. Wall), for respondent.

KAUFMAN, *Circuit Judge*:

This case is here on a petition of Trey Packing, Inc. (hereinafter referred to as the Company)[1] for review of the National Labor Relations Board's order of June 26,

[1] Gol-Pack Corporation and National Frosted Food Co., Inc. were also named as respondents before the Board. Joseph Goldwasser is president of all three corporations, and the Board referred to all three collectively as the employer. However, since Trey Packing is the only one of the three companies involved in the alleged unfair labor practices under consideration, we shall confine our discussion to it alone.

1968.[2] The Board has cross-petitioned for enforcement of the order.

The Trial Examiner found, after a hearing, that the Company had violated §8(a)(5) of the National Labor Relations Act by refusing to bargain with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helps of America, Local No. 182 (hereinafter referred to as the Union), §8(a)(1) of the Act by interrogating its employees concerning their union activities, threatening them with reprisals for union activities, and promising them benefits for refraining from union activity, and §8(a)(3) by discharging two of its employees for union activity. The Board adopted the findings and conclusions of the Trial Examiner and ordered the Company to cease and desist from its unfair labor practices, to bargain with the Union, to reinstate the discharged employees in their former positions at its Oneida plant and reimburse them for any losses suffered as a result of the discriminatory discharges, and to post the usual notices. For the reasons below, we deny the Company's petition for review and grant the Board's cross-petition for enforcement of its order.

I.

Trey Packing, Inc. is a New York corporation, with its principal place of business in Oneida, New York, where it is engaged in the processing, manufacture, sale and distribution of meat and meat products. At the time

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[2] Since it is undisputed that Trey Packing is engaged in commerce within the meaning of the Act, and that the alleged unfair labor practices occurred in Oneida, New York, the Company's principal place of business, there is no question as to the court's jurisdiction.

of the events in question, the Company employed at its Oneida plant five truckdrivers to make its pickups and deliveries, four of whom were over-the-road drivers while the fifth was a combination warehouseman-driver. In early June of 1967, one of the Company's drivers, Robert Hughes, telephoned L. Frank Parks, assistant business agent for the Union, and informed him that the drivers were interested in having the Union represent them. On June 10, all four of the Company's over-the-road drivers met and signed union authorization cards.[3] The Union then sent the Company a letter, which it received on June 14, stating that "the drivers at your Oneida, New York branch have become paid up members of the Teamsters Local No. 182," and requesting that the Company make arrangements to bargain with it. The Company failed to respond to this letter.

About June 17, William Trexler, one of the Company's drivers, went to see Lawrence Goldwasser, the secretary of the Company and son of its president, concerning another matter. During the course of the conversation, Trexler asked Goldwasser how he felt about the Union. According to Trexler's testimony, which the Trial Examiner found credible, he stated to Goldwasser, ". . . as you probably know, we joined the union," to which Goldwasser responded that he would like to know why the men took this step. He went on to state that matters of dissatisfaction could have been worked out without the Union, and asked Trexler which of the employees had signed cards. Trexler answered that "all four driv-

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[3] These cards stated: "I . . . hereby authorize the representatives of the Teamsters, Chauffeurs, Warehousemen and Helpers, Local 182, to represent me and, in my behalf to negotiate and conclude all agreements as to hours of labor, wages, and other employment conditions."

ers" had signed and given the cards to Parks. Goldwasser said in response that if the Union were chosen as the employees' bargaining representative, its demands would be so high that in the future he would not be able to afford to let the men work 40 hours a week as had been their custom, and that he would no longer be able to talk to them "man to man." A few days later, Goldwasser advised Trexler that if the Union became the employees' representative, the Company could ship by "gypsy" drivers and lay off some of the workers.

Trexler also testified that he had another conversation with Goldwasser on Friday, June 23, at which time he asked Goldwasser to speak to the drivers and to convey to them directly his feelings about the Union. Goldwasser replied that he could not, but asked Trexler to do so in his behalf, and to inform the men that if they withdrew from the Union, "things would be as . . . before." Goldwasser went on to say that his father had started trucking out of Oneida as an experiment, and that if the men persisted in unionizing, he might discontinue the operation and dismiss the drivers. He further commented that the Company had originally moved to Oneida to get away from the Union. The conversation concluded with Goldwasser's request that Trexler should "see what [he] can do," and advise Goldwasser of the men's decision at their forthcoming meeting.[4]

The following day, Trexler went to the home of John Wands, the Company's plant manager, and told him about the meeting he was planning at Goldwasser's suggestion. According to Trexler, Wands stated that he

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[4] According to Goldwasser's version concerning this discussion, after he told Trexler that he opposed the Union, Trexler said, "I didn't know you felt that way. I may reevaluate the situation."

had been instructed not to talk to the drivers about the Union, but he nevertheless went on to say that the Union would not be successful, and that if it were, the men would not be driving any longer for the Company.

On Monday, June 26, Trexler met Goldwasser again. At that time, in response to Goldwasser's questions, Trexler told him that the employees had decided not to withdraw from the Union. When Goldwasser asked which of the drivers refused to withdraw, Trexler named Robert Robinson and Robert Hughes. About an hour after this conversation, Goldwasser summoned these two men to his office and told that that they were being laid off, giving each a letter stating that the reason for this action was "[a] decrease in the transportation of our products and the products of other companies with which we deal." Goldwasser further advised the men that the layoff was to take effect immediately, and that they should not finish unloading the truck then in process.

Another of the drivers, Donald Baker, testified that on June 22, Wands telephoned and asked him to meet Wands the following morning. At this meeting, Wands also asked about the grievances of the drivers, stated that the Company could be helpful without the Union and that the Union "was a crook" and could be bought off. He then inquired if Baker intended to remain with the Union, to which Baker replied that he was undecided. Wands then declared that if the employees dropped out of the Union they would keep their jobs, but that if they did not, the Company could ship by common carrier as it had before and would lay off some employees. Baker also testified that he spoke with Goldwasser on or about July 5, at which time Goldwasser told him that there would be an increase in pay in early August, and that if he did not join the Union he could have a job work-

ing on the inside of the plant, as Baker had previously requested.

Ruth Trexler, the driver's wife, testified that Wands told her that Hughes and Robinson had been given a chance to drop out of the Union (at this time they had already been discharged), that her husband would have a job as long as he remained loyal to the Company, and that if Baker did not drop out of the Union, he would get the same treatment as Hughes and Robinson.

II.

Based upon the testimony briefly set forth above, the Board found that the Company had violated §8(a)(1) by threats of reprisals, promises of benefits, interrogation of individual employees, and requesting an employee to solicit other employees to withdraw from the Union all of which infringed upon the free exercise of the right of self-organization guaranteed the employees by §7 of the Act. More specifically, the reprisals threatened including cutting down or discontinuing the trucking operations and using instead common carriers or gypsy drivers, reducing the working hours of the drivers, and discharging those drivers who joined the Union; the benefits promised included satisfaction of the employees' grievances about working conditions, a raise in pay in August, and for Baker, a transfer to the job which he had requested.

The Company argues in defense (1) that Trexler's testimony was not credible, (2) that Goldwasser's speech was protected under the Act, and in any case was not illegal because it was procured by entrapment, and (3) that Wands' statement cannot be attributed to the employer because they were unauthorized.

Appendix A

As to the credibility of Trexler's testimony, it is sufficient for us to note that, based upon his observations of the witness, the Trial Examiner specifically found Trexler to be "a credible witness who was telling the truth." The Trial Examiner's findings of credibility cannot be ignored by us when we consider whether the Board's findings of fact were supported by substantial evidence. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 493 (1951). Moreover, our reading of Trexler's testimony does not reveal those egregious inconsistencies which the Company argues indicate that he was lying; rather his progressive inclusion of greater detail in response to questioning suggests to us, at it did to the Trial Examiner, merely that he needed to have his memory refreshed as to details of events which had occurred many months earlier. Finally, we note that Lawrence Goldwasser did not specifically refute any of the statements attributed to him by Trexler, but simply denied in general terms having made any threats or promises. And to the extent that the testimony of the two did conflict, we believe that the Trial Examiner, having observed the demeanor of each, was justified in choosing to believe Trexler rather than Goldwasser. Accordingly, we are of the view that the Board's findings were supported by substantial evidence on the record as a whole. See *Universal Camera Corp.* v. *N. L. R. B., supra.*

The Company also argues that Goldwasser's statements were protected under the Act. We find little merit to this. Section 8(c) which protects the right to express "views, argument, or opinion," specifically excludes from its scope such expressions which contain threats of reprisals or promises of benefits. Moreover, the Company's claim that Trexler entrapped Goldwasser into making the statements is entirely ephemeral in this case. Even if entrapment might in some other circumstances be a valid defense to

an unfair labor practice charge, a question as to which we express no opinion, we can by no stretch of the imagination consider Trexler to have been an agent of the government while he was discussing the Union with Goldwasser and Wands, as the law of entrapment would require. If more is needed, we note that in light of the Company's other illegal conduct discussed below, we cannot attach great weight to its argument that but for Trexler's inducement, Goldwasser would not have been likely to engage in the faulted conduct.

Finally, the Company contends that Wands' statements should not have been attributed to it because the president of the Company had told him, as he revealed to Trexler, that he should not talk to the drivers about the Union. The general rule is that an employer will be charged with responsibility for the acts of his supervisory employees when its employees would have just cause for believing that he was acting on behalf of the company. *Irving Air Chute Co.* v. *N. L. R. B.*, 350 F. 2d 176, 179 (2d Cir. 1965). Accordingly, the statements which Wands made to Trexler, considered *in vacuo*, would not be attributable to the Company, since Trexler testified that Wands had told him that he was instructed not to make any statements concerning the Union. But when Wands' statements to Trexler are considered in the context of the Company's other actions, we believe they are fairly attributable to it, since at about the same time Wands made his threats and promises, Goldwasser, who was clearly speaking for the Company, was making similar threats and promises and then actually carried through by discharging Hughes and Robinson for Union activity. Thus, although Trexler was told that Wands should not be speaking with him, we believe that based on all the events which were occurring almost simultaneously, he had good reason for believing that Wands

was really voicing firm Company policy when he spoke to the issues. The statements Wands made to Baker are clearly on a different footing. There is no evidence that Baker was ever told that Wands lacked authorization. Accordingly, we believe that the Board's findings of 8(a)(1) violations were amply supported by the evidence, and we affirm.

III.

The Company insists that its action in discharging Robinson and Hughes was not motivated by anti-union animus, but by valid economic considerations. In particular, it maintains that it dismissed the two men because, due to numerous breakdowns, trucking operations out of Oneida had proved too costly and it had decided instead to make deliveries to its customers out of warehouses in Quincy, Massachusetts, and Secaucus, New Jersey, thus reducing the number of drivers needed in Oneida. The Trial Examiner and the Board rejected this explanation for several very cogent reasons. First, when asked about the number of truck breakdowns, Goldwasser said he refused to "be cornered as to specifics," and when the drivers described the breakdowns they had experienced, the number did not seem abnormally large. Moreover, under the Company's truck rental arrangement, the lessor of the trucks bore the expense of their repair. The Trial Examiner and the Board thus concluded that little credence should be attached to this ground for dismissal. Second, although the Company did change its trucking operation, this change did not go into effect until several months after the two drivers were discharged. In the interval, while deliveries were still being made out of Oneida, the Company used the services of a common carrier to make the deliveries which Robinson and Hughes had previously made and also employed one of its maintenance men for

some deliveries. Third, the Company abandoned the reason it had set forth in its letter the two men at the time they were discharged—that there had been a decline in the transportation of its own and others' products.

In view of the findings that the Company's asserted reasons for the discharge could not support this action, that the Company changed its purported reason for the dismissal, *N. L. R. B.* v. *Milco, Inc.*, 388 F. 2d 133 (2d Cir. 1968), that the discharges occurred so abruptly after the Company learned that these men were the staunchest supporters of the Union, *N. L. R. B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (2d Cir. 1968), and that the discharges were the fulfillments of its earlier threats, we cannot see how the Board could have decided other than as it did.

V.

Finally, there remains for consideration the Company's alleged violation of §8(a)(5). The Company here rests its defense primarily on the claim that after receipt of the Union's letter requesting bargaining on June 14 it had a good faith doubt as to the Union's majority because the Union falsely stated that all the drivers had become paid up members of the Union and subsequently that several drivers indicated that they were unsure as to whether they wished to continue supporting the Union. Additionally, the Company contends that it believed the appropriate unit should consist of all five drivers, while the Union contemplated a unit consisting of only the four over-the-road drivers.

The Union's statement that all of the drivers had become paid up members was indeed false. And we agree that such misrepresentation was entirely reprehensible. Nevertheless, on June 17, Goldwasser learned from Trexler that

four of the drivers had signed cards which unambiguously authorized the Union to represent them. And while it is true that both Trexler and Baker expressed doubt over staying with the Union, neither gave this indication until after he had been threatened with reprisals for union activity. Moreover, after it had clearly learned of the Union's majority, the Company neither responded to the Union's request to bargain nor took any other action. For example, it never requested proof of the Union's majority, an act which would have indicated some evidence of its good faith doubt. Rather, it embarked on a course of action obviously designed to destroy the Union's majority. And when viewed against the background of such clearly illegal conduct, its claimed concern over the appropriateness of the bargaining unit suggested by the Union seems at best disingenuous. See *Irving Air Chute Co.* v. *N. L. R. B.*, *supra* at 182.

Finally, the Company argues that it should not be ordered to bargain with the Union without first holding an election, relying on *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4th Cir. 1967),cert. denied, 390 U. S. 1028 (1968), and *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 367 (4th Cir. 1967), cert. denied, 390 U. S. 1028 inapposite here since in *Crawford*, the court found that the authorization cards had been obtained from the employees by a misrepresentation as to their significance and use, and in *Logan* the court found only minimal violations of §8(a)(1). In this case, in view of the Company's consistent and deliberate course of conduct in violation of §§8(a)(1), (3) and (5) we believe a bargaining order to be entirely appropriate. See, e.g., *N. L. R. B.* v. *Big Ben Department Stores, Inc.*, 396 F. 2d 78 (2d Cir. 1968); *N. L. R. B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684 (2d Cir. 1966).

The Company's petition for review is denied and the Board's cross-petition for enforcement is granted.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 32,559, 32,560
32,561, 32,713

TREY PACKING, INC., GOL-PAK CORPORATION,
NATIONAL FROSTED FOOD CO., INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before:

Kaufman, Anderson, Circuit Judges, and
Tenney, District Judge.*

THIS CAUSE came on to be heard upon the petition of Trey Packing, Inc., Gol-Pak Corporation, National Frosted Food Co., Inc., to review the order of the National Labor Relations Board issued against Petitioner their officers, agents, successors, and assigns on June 26, 1968, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 20, 1968, and has considered the briefs and the transcript filed in this cause. On December 11, 1968, the Court being fully advised in the prem-

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* Of the Southern District of New York, sitting by designation.

ises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that Trey Packing, Inc., Gol-Pak Corporation, National Frosted Food. Co., Inc., their officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

.....
Judge, United States Court of Appeals for the Second Circuit

.....
Judge, United States Court of Appeals for the Second Circuit

FILED: January 7, 1969.

APPENDIX C

Excerpts from Hearing Before the National Labor Relations Board, Monday, November 6, 1967

Examination of William Trexler, a witness for the Board beginning at p. 44 of the transcript:

By Mr. McNamara:

Q. All right. Thereafter, did you have any conversation with Larry Goldwasser?

Mr. Bracken: What do you mean by thereafter?
The Witness: Yes, I did.

(45) *By Mr. McNamara*:

Q. After you signed the card? A. Yes, I did, about a week later.
Q. Who is Larry Goldwasesr? A. He's my boss.

Trial Examiner: It's conceded—

By Mr. McNamara:

Q. Where did this take place? A. In his office.
Q. Under what circumstances were you in his office? A. I asked him something about my vacation and approached him—
Q. Will you tell—

Mr. Bracken: Let him complete the answer.

* * *

(46) Trial Examiner: Where did this take place?
The Witness: In his office.
Trial Examiner: Just the two of you present?
The Witness: Yes.

Appendix C

Trial Examiner: What was said?

The Witness: I asked him about my vacation pay. We put that out of the way and then I asked him how he felt about the Union. He said he doesn't think too much about it and I said, "Well, as you probably know, we joined the Union."

• • •

(48) *By Mr. McNamara*:

Q. Now, Mr. Trexler, did you have any further conversation with Mr. Goldwasser after that date? A. Yes, I did.

Q. Can you tell us approximately when that was? A. That was the following Friday, about the 23rd or the 24th.

Q. All right. Can you tell us where did this take place? A. In his office.

Q. How did it come about you were in his office? A. I don't really remember whether he called me in or I went in on my own. I could have been in there for anything, really.

Q. Can you tell us what was said and by whom, if anything?

Trial Examiner: Was anyone else present?

The Witness: No.

By Mr. McNamara:

Q. Can you tell us what was said and by whom, if anything? A. Well, I believe I asked him about getting the fellows together the following day and tell us all in a group what he had told me about, the new truck and everything, because he told me before he didn't want the Union in. I asked him why (49) he didn't come and talk

to us and he said he couldn't. He said he couldn't get the fellows together without anyone else there; no Union representative, and "Tell them what I have told you and tell them if they back out of the Union, things would be as they was before." And that to call him at his house and let him know which they had decided. Whether to back out of the Union and keep their jobs or stick with the Union.

Examination of Ruth Trexler, a witness for the Board, beginning at p. 81 of the transcript:

Direct examination by Mr. McNamara:

Q. State your name and address, please? A. Ruth Trexler, 143 Prospect, Sherrill, New York.

Q. And you're a housewife? A. Yes.

Q. Are you related to William Trexler. A. Yes.

Q. What relationship? A. Wife.

Q. Do you know John Wands? A. Yes.

Q. Who is John Wands? A. I don't know what he does, but he works at Trey Packing.

Trial Examiner: It's in the Pleadings, his status is (82) Plant Manager of Trey Packing.

By Mr. McNamara:

Q. Now, did you ever have any conversation with John Wands concerning the Union? A. Yes.

Q. Can you tell us when that was? A. Approximately the first or second week in July.

Q. And where did this take place? A. Right outside the fence.

Q. Where was this fence? A. At Trey Packing, it's fenced in. It was right outside the gate.

Trial Examiner: At the plant?
The Witness: Yes.

By Mr. McNamara:

Q. Can you tell us what he said to you and you said to him, if anything? A. I said, "John, what—I called him over to the car, I think I had gone to pick up a bag. I said, "What do you think about the Union" because at this time I wasn't for it, either. He said, "You know the Union will never get in here. They'll go common carrier first." And I figured myself—

Q. Not what you figured, what was said? A. Well, Bill [Trexler] wasn't for the Union—

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 998

TREY PACKING, INC., GOL-PACK CORPORATION, NATIONAL FROSTED FOOD CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ADDITIONAL APPENDIX

JOHN J. BRACKEN,
Counsel for Petitioners,
786 Broad Street,
Newark, New Jersey, 07102.

BRACKEN & WALSH,
Attorneys for Petitioners.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

APPENDIX D

Decision and Order of the National Labor Relations Board

On February 28, 1968, Trial Examiner John P. von Rohr issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and General Counsel filed exceptions to the Decision of the Trial Examiner and supporting briefs and the Respondent filed a brief in answer to the exceptions and brief of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,[1] as herein modified.

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[1] Exceptions have been taken to some of the credibility findings of the Trial Examiner which were based to a large extent on demeanor of witnesses. It is the Board's policy, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C. A. 3).

Appendix D

For reasons fully set forth in his Decision, we agree with the Trial Examiner's conclusions that Respondent violated Section 8(a)(1), (3), and (5) of the Act by discharging employees Hughes and Robinson and curtailing the trucking operations at Respondent's Oneida, New York, facility for the purpose of depriving the employees of rights guaranteed by Section 7 of the Act and to avoid dealing with the Union as majority representative of its truckdrivers.

In fashioning a remedy for the violations, however, the Trial Examiner recommended that Respondent be permitted to choose between alternative remedies of restoring the driving jobs eliminated from the Oneida facility and reinstating Robinson and Hughes therein, or reinstating them with travel and moving expenses at its new Quincy facility in Watertown, Massachusetts, discharging if necessary truckdrivers hired subsequent to the discrimination. General Counsel has excepted to this remedy and urges the Board to order Respondent to restore the truckdriving jobs at the Oneida facility and offer the discriminatees reinstatement at that facility.

Respondent was actively considering expanding and decentralizing the distribution phase of the Oneida operation when the Union organizational activities herein began. However, plans had not yet been formalized. In fact, negotiations for the Massachusetts facility were not commenced until after the discharges herein, and the trucking operations at the Quincy (Watertown), Massachusetts, and Secaucus, New Jersey, facilities did not become operational until 2 or 3 months after the termination of Robinson and Hughes. During the interval Respondent used common carriers and other improvised arrangements,

including utilization of the machanic and his truck to handle deliveries that normally would have been made by the two discharged employees. Even after the decentralization was effected, Respondent did not close the Oneida distribution operation but merely shifted to Quincy and Secaucus some of the deliveries formerly handled by the Oneida facility. Indeed, Respondent testified that the Quincy and Secaucus facilities have taken over only about 50 customer drops that were eliminated from the Oneida operation.[2] Respondent still distributes its own products processed at Oneida and relays products received from the Union City, New Jersey, processing plant to the distribution points.

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[2] On direct examination, Respondent's Secretary Lawrence Goldwasser testified that following the discharges of Robinson and Hughes:

> . . . Instead of one man riding all the way to Boston for a straight eight hours with fifty drops on and coming back three or four days later. . . . *The new change was to do our shipping with common carrier.* . . . So we eliminated some fifty drops per truck to two drops per truck and now coming back with a return load going down to Gol-Pak and driving a load back.

Goldwasser further testified [that due to the operational changes] New England drops [presently] are made out of Boston and an occasional major drop "almost the whole truck" is made out of Oneida. Regarding the changes, neither of Respondent's witnesses testified with clarity. When pressed by General Counsel for more details of the eliminated stops, L. Goldwasser stated, "Here's my point, when I say eliminate fifty stops, *I mean fifty stops would have been peddled by one of the drivers and is now shipped by common carrier.* . . ." (Emphasis supplied.)

Appendix D

While it is possible that Respondent for economic reasons, may eventually have curtailed its Oneida truck delivery operations and shifted to common carrier and decentralized deliveries, the record clearly establishes that it took the action herein to evade its statutory obligation, which would have included bargaining about the transfer of delivery operations and the effects upon employees. Had it done so, the employees not only may have been given an opportunity to transfer to one of the new facilities or to nondriving work at Oneida, but may have retained the work assigned to common carrier. In any event, it must be presumed they would have retained their jobs until Respondent's bargaining obligations were fulfilled. Respondent offered no testimony of a decline of business at Oneida. In fact, the need for additional storage space which Respondent considered prior to the union demand would seem consistent with Respondent's testimony of a general increase in its business. Nor did Respondent offer any evidence which would tend to show that a resumption of truck delivery operations at Oneida would cause any considerable change in its business or subject Respondent to undue financial hardship. Respondent still has possession of the rented trucks formerly used at the Oneida facility and there is no evidence that if Respondent ceased using common carriers and other makeshift arrangements, it would not have adequate truckdriving work for Robinson and Hughes at this facility.[3]

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[3] Absent a more definitive explanation or evidence to the contrary, the following exchange at the hearing between General Counsel and Goldwasser tends to show that in addition to having

(*Footnote continued on following page*)

Under these circumstances, redress of the 8(a)(3) and (5) violations warrants restoration of the *status quo ante*. Accordingly, we shall order that Respondent restore the jobs eliminated from its Oneida facility and offer to Robinson and Hughes reinstatement to their former positions,[4] and that Respondent fulfill its statutory obligation to bargain with the Union concerning terms and conditions of employment. This order will not preclude effectuation of operational changes affecting the jobs, provided Respondent satisfies its obligation to bargain with the Union about such changes and does not make operational changes for a discriminatory motive.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as herein modified, and hereby orders that

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(*Footnote continued from preceding page*)

a need of drivers for transporting products from Oneida to its new distribution centers, Respondent is still using common carriers to handle stops eliminated from Oneida:

> Q. (By General Counsel) Which runs were they that were stopped? A. New England runs.
>
> • • •
>
> Q. Who makes the deliveries now? A. Common carrier.
> Q. From where? A. New Jersey. Some of the stops are made from the Boston area.

[4] *Preston Feed Corporation*, 134 NLRB 629, enfd. 309 F. 2d 346 (C. A. 4). Cf. *Valley Forge Flag Company*, 152 NLRB 1550, 1567; *Dairy Farmers Transfer*, 158 NLRB 78.

Appendix D

Respondent, Trey Packing, Inc.; Gol-Pak Corporation; National Frosted Food Co., Inc., Oneida, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified below:

1. Insert in paragraph 1(c) of the Recommended Order after the words "conditions of employment" the phrase "and from unilaterally making operational changes which affect the jobs of unit employees without prior bargaining with the above-named Union or any other union its employees may select as their exclusive bargaining representative about such changes and the effects such changes may have on employees' jobs."

2. In paragraph 2(a) of the Recommended Order, delete the words "Offer to Robert Robinson and Robert B. Hughes" and insert

> "Restore to the Oneida, New York facility the jobs formerly held by Robert Robinson and Robert B. Hughes and offer them."

3. Delete from paragraph 2(e) of the Recommended Order the reference to Watertown, Massachusetts.

4. Insert the following paragraph after the sixth indented paragraph of the Notice to All Employees:

> WE WILL NOT make operational changes which affect the jobs of unit employees without bargaining with the above-named Union or any other union employees have selected as their exclusive bargaining representative about such changes and the effect such changes may have on their jobs.

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5. In the next to last indented paragraph in the Notice to All Employees, delete the words "We Will offer Robert Robinson and Robert B. Hughes" and insert

> "We Will restore to our Oneida, New York, facility the jobs formerly held by Robert Robinson and Robert B. Hughes, and offer them."

6. Add the following immediately above the double line at the bottom of the Notice to All Employees:

> NOTE: We will notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C., June 26, 1968.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 998

TREY PACKING, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On facts adequately summarized in the court of appeals' opinion (Pet. App. 3a-7a), the Board found that Trey Packing, Inc. had violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees about union matters, after receiving a request for union recognition; by requesting an employee to solicit other employees to withdraw from the Union; by threatening reprisal for union activities; and by promising benefits for refraining from union activity. The Board also found that the Com-

pany had discriminatorily discharged two union adherents in violation of Sections 8(a)(3) and (1) of the Act. Finally, the Board found that the Company's refusal to bargain with the Union, which represented a majority of the employees, was not prompted by a good faith doubt as to the union's majority, and thus violated Section 8(a)(5) and (1) of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found; to offer reinstatement to the two discharged employees and to make them whole for any loss of earnings they may have suffered because of the discrimination; and to bargain with the Union upon request (Pet. 3a). The court of appeals found the Board's decision "supported by substantial evidence" (Pet. App. 8a), and enforced its order.

2. The contention (Pet. 5-6) that officials of the Company were "entrapped" when employee Trexler and his wife solicited their views respecting the Union was properly rejected by the court below. As the court pointed out (Pet. 9a), "we can by no stretch of the imagination consider Trexler to have been an agent of the government while he was discussing the Union." The court added that "in light of the Company's other illegal conduct * * * we cannot attach great weight to its argument that but for Trexler's inducement, [the Company] would not have been likely to engage in the faulted conduct."

Petitioner's contention (Pet. 7-9) that the court below violated its "legal rights" by setting a date for oral argument which precluded it from studying the Board's brief and presenting a reply brief is equally

insubstantial. The court afforded petitioner an opportunity to file a reply brief after the argument (Pet. 9). Moreover, petitioner could have petitioned for rehearing, but failed to do so.

Petitioner's remaining contention is that "the Second Circuit has * * * issued an order to enforce bargaining as an automatic punishment for an unfair labor practice despite the good faith doubt" (Pet. 7), in alleged conflict with the Fourth Circuit rule now before this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, Nos. 573 and 691, this Term, certiorari granted, December 16, 1968. Under the Fourth Circuit's rule, an employer claim of good faith doubt that a union has attained majority status through solicitation of authorization cards is held to be presumptively valid, in view of the alleged "inherent unreliability" of such cards, and therefore employers claiming such doubts may not be found unlawfully to have refused to bargain when presented with a union demand for recognition and bargaining based upon cards. As was not true in the Fourth Circuit cases refusing enforcement of bargaining orders, however, the Trial Examiner here found that "at no time after the bargaining demand did [the Company] inform the Union that it doubted its majority status" (Pet. App. in the court of appeals, 38a). Since no good faith doubt was claimed in dealings with the Union, no circuit would have refused to enforce the Board's bargaining order. Compare *National Labor Relations* v. *Sehon Stevenson & Co.*, 386 F.2d 551 (C.A. 4). The reliability of the authorization cards

in this case was never put in question.[1] Therefore, there is no occasion here for the Court to postpone its consideration of the instant petition until its decision in *Gissel*.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

FEBRUARY 1969.

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[1] Petitioner rests its claim of good faith doubt on two factors: (1) three of the five employees in the unit expressed doubt as to their union allegiance *prior to* the Company's illegal acts; and (2) there was a question as to the size of the unit (Pet. 6). However, the Board found that the defections occurred after, and as a result of, the Company's illegal conduct. Moreover, since the Union had cards from three employees, it was irrelevant whether four or five drivers were included in the unit.

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